STATE OF MICHIGAN

COURT OF APPEALS

RUSSELL JACKSON,

Plaintiff-Appellant,

v

WAYNE COUNTY JUVENILE DETENTION FACILITY, WAYNE COUNTY, and LEONARD DIXON,

Defendants-Appellees.

UNPUBLISHED
April 25, 2006

No. 257358
Wayne Circuit Court
LC No. 02-222180-CL

Before: Markey, P.J., and Schuette and Borrello, JJ.

PER CURIAM.

Plaintiff appeals as of right an order granting summary disposition in favor of defendants and dismissing plaintiff's claim that defendants discharged him from employment in violation of Michigan's Whistleblowers' Protection Act ("WPA"). We affirm.

I. FACTS

Plaintiff was employed by defendants as a Juvenile Detention Specialist ("JDS") at the Wayne County Juvenile Detention Facility, also referred to as the "youth home." Plaintiff was also the president of his union organization, ASFCME Local 409. Leonard Dixon was the executive director of the youth home. Plaintiff claims that he was placed on a forced leave of absence, and later discharged, in retaliation for comments he made at a public hearing or forum held by United States Congressman John Conyers in Detroit. Plaintiff alleges that his comments were rooted in plaintiff's discovery that the management and staff of the youth home were participating in ongoing violations of federal and state law and regulations. Plaintiff maintains that his comments were directed, in part, at Jeriel Heard, who attended and spoke at the forum, and who was the director of the Wayne County Department of Community Justice. One of the duties of Heard's position was to oversee the administration of the youth home.

Defendants, on the other hand, claim that plaintiff was properly discharged because his name is listed on Michigan's central registry for child abuse and neglect. This registry is maintained to carry out the intent of Michigan's Child Protection Law, MCL 722.621 *et seq.* MCL 722.627(1). The law requires certain mandatory reporters – including nurses, teachers and regulated child care providers – to report incidents giving rise to "reasonable cause" to suspect child abuse or neglect. MCL 722.623(1)(a). The contents of the registry are generally

confidential, subject to a list of exceptions which allow disclosure to a person named in a report as an alleged perpetrator as well as, for instance, to child care regulatory agencies. MCL 722.627(2), (2)(f) and (2)(r). Plaintiff was placed on the registry as a result of a 1998 incident, but defendants claim not to have been aware of his listing until March 25, 2002.

II. STANDARD OF REVIEW

We review a trial court's decision on a motion for summary disposition de novo. *Graves v American Acceptance Mortg Corp (On Rehearing)*, 469 Mich 608, 613; 677 NW2d 829 (2004). Whether a plaintiff has established a prima facie case under the WPA is also a question of law we review de novo. *Manzo v Petrella*, 261 Mich App 705, 711; 683 NW2d 699 (2004).

III. ANALYSIS

The WPA, MCL 15.361 *et seq.*, was designed to protect the public from the unlawful conduct of corporations and public bodies. *Anzaldua v Band*, 457 Mich 530, 533; 578 NW2d 306 (1998). It protects the public by shielding employees who report unlawful conduct from retaliation by their employers. *Id.* The act broadly defines "employee" and "employer" and applies to the state and its political subdivisions as employers. MCL 15.361(a) and (b); *id.* The crux of the act mandates:

> An employer shall not discharge, threaten, or otherwise discriminate against an employee regarding the employee's compensation, terms, conditions, location, or privileges of employment because the employee, or a person acting on behalf of the employee, reports or is about to report, verbally or in writing, a violation or a suspected violation of a law or regulation or rule promulgated pursuant to a law of this state, a political subdivision of this state, or the United States to a public body . . . . [MCL 15.362; *West v GMC*, 469 Mich 177, 183; 665 NW2d 468 (2003).]

A person who alleges violation of the act may bring a civil action for injunctive relief, actual damages, or both. MCL 15.363; *Anzaldua, supra* at 534. To establish a prima facie case under the WPA, a plaintiff must show that:

> (1) the plaintiff was engaged in protected activity as defined by the act, (2) the plaintiff was discharged or discriminated against, and (3) a causal connection exists between the protected activity and the discharge or adverse employment action. [*West, supra* at 183-184.]

Here, the parties contest whether plaintiff could establish the first and third elements of a prima facie WPA case. With regard to the first element, defendants claim that plaintiff was not engaged in protected activity because Conyers's forum does not meet the act's definition of a

"public body" given that the WPA appears to require a report to a state or local public body, rather than to an officer of the federal government. MCL 15.361(d).[1]

With regard to the third element, plaintiff argues that a genuine issue of material fact exists concerning whether his comments at the forum were the actual reason for his discharge. In evaluating claims under the WPA, this Court applies the burden-shifting analysis used for claims of retaliatory discharge under Michigan's Civil Rights Act, MCL 37.2101, *et seq.* *Taylor v Modern Engineering, Inc*, 252 Mich App 655, 659; 653 NW2d 625 (2002). If a plaintiff can prove the prima facie elements, the burden then shifts to the defendant to produce evidence of a legitimate business reason for the discharge. *Id.* If the defendant does so, the burden then shifts back to the plaintiff to show that the proffered reason was merely a pretext for the discharge. *Id.* Summary disposition is then proper if the plaintiff cannot provide sufficient evidence of pretext. *Id.* To raise a triable issue that the employer's proffered reason is merely pretext, a plaintiff "can prove pretext either directly by persuading the court that a retaliatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." *Id.* at 660, quoting *Roulston v Tendercare (Michigan), Inc*, 239 Mich App 270, 281; 608 NW2d 525 (2000).

The trial court primarily based its ruling on its conclusion that an earlier employment arbitration between the parties precluded a finding that plaintiff was discharged for illegitimate reasons. We note that, although the court used the phrase "res judicata," it essentially appears to have concluded that plaintiff was collaterally estopped from claiming that his discharge was retaliatory given that the arbitrator found that plaintiff was discharged "for a proper purpose." We review de novo whether a suit or an issue is barred under the doctrines of res judicata or collateral estoppel. *Adair v Michigan*, 470 Mich 105, 119; 680 NW2d 386 (2004); *Minicuci v Scientific Data Mgt, Inc*, 243 Mich App 28, 34; 620 NW2d 657 (2000).

"Collateral estoppel precludes relitigation of an issue in a subsequent, different cause of action between the same parties when the prior proceeding culminated in a valid final judgment and the issue was actually and necessarily determined in the prior proceeding." *Porter v Royal Oak*, 214 Mich App 478, 485; 542 NW2d 905 (1995). The principle applies to factual determinations made during grievance hearings or arbitration proceedings. *Id.* Moreover, this Court has explicitly stated that

> factual findings made by an arbitrator after a proper arbitration proceeding are conclusive in a later-filed civil suit between the same parties, including a situation in which the earlier arbitration involved a contractually based wrongful discharge claim and the later lawsuit involves a claim that the employee's

[1] We decline to fully address this issue because it is unnecessary to our disposition of the case. However, we briefly note that plaintiff's evidence that his comments were directed, in part, to Heard likely suffices to render his comments protected activity. Heard was the director of a county department and MCL 15.361(d)(iii) explicitly includes county departments and employees.

discharge violated one or more state civil rights statutes. [*Cole v West Side Auto Employees Fed Credit Union*, 229 Mich App 639, 647; 583 NW2d 226 (1998).]

However, *Cole* is factually distinguishable from this case and therefore is not dispositive to our ruling. In the *Cole* decison, this Court explicitly noted that the collective bargaining agreement included statutorily based employment discrimination claims. *Cole, supra* at 651-652. Accordingly, the *Cole* Court rejected the plaintiff's reliance on *Florence v Dep't of Social Services*, 215 Mich App 211, 214; 544 NW2d 723 (1996), in which this Court ruled that a previous grievance settlement did not bar the plaintiff's subsequent claims which were grounded in civil rights statutes. *Cole, supra* at 651. The *Cole* Court found its facts distinguishable because the grievance procedure in *Florence* was limited to contractual grievances and, therefore, "the union was not in a position to concern itself with adequately representing the employee's interests with regard to claims based on statutory rights bestowed independently of any collective bargaining agreement." *Id.* Similarly, here, there is no evidence that the arbitration provision encompassed statutory grievances. Accordingly, *Cole* arguably at least leaves open a question whether plaintiff is bound to the arbitrator's factual findings absent proof that his statutory interests were taken into consideration during the arbitration.

Most significantly, the instant case differs from *Cole* in that, here, the arbitrator's factual findings do not bear a direct relation to the elements of plaintiff's WPA claim. In *Cole,* this Court concluded that, "[a]rguably, the arbitrator's finding that [the plaintiff's] discharge was 'based upon just cause' would necessarily encompass a factual determination that he was not qualified for his position." *Cole, supra* at 649. This Court also went on to "assum[e] for purposes of discussion that a finding of just cause does not automatically amount to a finding that an employee is unqualified for a position." *Id.* This Court proceeded to examine the arbitrator's factual findings that the plaintiff's alcoholism, its damage to his relationship with other employees and the public, and his resulting misconduct disqualified him for his position. *Id.* This Court then concluded that these findings specifically precluded the plaintiff from stating prima facie claims under the Michigan Handicappers' Civil Rights Act (HCRA) or Michigan's Civil Rights Act: he did not have a handicap under the HCRA because that act expressly excludes alcoholism as a disability where the condition prevents the employee from performing his duties; and, his age discrimination claim under the Civil Rights Act could not succeed because such a claim requires proof that the employee was qualified for his position when he was discharged. *Id.* at 647-648.

Here, however, the arbitrator determined that plaintiff was discharged for good cause only because a subsequent change in state law disqualified plaintiff for his position. Moreover, the arbitrator also specifically determined both that plaintiff's original placement on leave violated the just cause standard and that, but for the change to state law, defendants would have been required by the collective bargaining agreement to restore plaintiff's position. Such findings merely beg the question whether defendants had a legitimate basis for originally placing plaintiff on leave and do not address whether a retaliatory motive was involved. Significantly, the arbitrator does not appear to have addressed issues of retaliation or discrimination. Rather, he appears to have presumed that plaintiff was, in fact, discharged because of his registry listing. He merely considered whether plaintiff's discharge nonetheless violated the just cause standard given that employees had not been notified that they could be discharged for this reason.

Accordingly, contrary to the scenario in *Cole*, here, the arbitrator's finding that plaintiff later became disqualified is irrelevant to a prima facie WPA claim, which requires proof only that: (1) plaintiff engaged in protected activity; (2) he was discharged or discriminated against; (3) and a causal connection exists. *West, supra* at 183-184. Similarly, plaintiff's later disqualification does not negate a finding that defendants' reasons were pretextual at the time that they took adverse action against him. Accordingly, although plaintiff's registry listing and disqualification for his position may support defendants' legitimate reasons for discharging him, the trial court erred when it concluded that the arbitrator's findings precluded plaintiff's claim. Therefore, summary disposition for this reason was improper.

Finally, we also note that, although the arbitration may affect the measurement of plaintiff's damages, plaintiff could still establish uncompensated damages as a result of his discharge. For instance, the arbitration award compensated plaintiff for the time he was improperly placed on unpaid leave. Although the trial court may have correctly assumed that plaintiff could not incur additional economic damages after MCL 722.119 apparently made him ineligible for employment as a JDS because of his registry listing, plaintiff may have suffered additional damages from the date that he was discharged, on June 28, 2002, until the date on which MCL 722.119 became effective.[2]

Nonetheless, we find that summary disposition was properly granted to defendants based on plaintiff's failure to create a genuine issue of material fact regarding whether defendants' proffered reasons for the discharge were pretextual.[3] Summary disposition should be granted pursuant to MCR 2.116(C)(10) when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Bergen v Baker*, 264 Mich App 376, 381; 691 NW2d 770 (2004). The moving party has the initial burden to support its claim for summary disposition by submitting affidavits, depositions, admissions, or other documentary evidence which negates an essential element of the nonmoving party's claim or which demonstrates that the nonmoving party's evidence is insufficient to establish an essential element of his claim. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). The burden then shifts to the nonmoving party to demonstrate that there is a genuinely disputed issue of material fact; when the burden of proof at trial would rest on the nonmoving party, he may not rest upon mere allegations or denials in the pleadings, but must, by documentary evidence, set forth specific facts showing that there is a genuine issue for trial. *Id.*; *Bergen, supra* at 381. A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the nonmoving party, leaves open an issue upon which reasonable minds could differ. *West, supra* at 183; *Bergen, supra* at 381. Finally, when deciding a motion for summary disposition under subrule

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[2] The trial court presumed the provision took effect on December 22, 2002. We note that it appears to have taken effect on March 31, 2003. Regardless, either date falls months after plaintiff's discharge.

[3] Our reasoning also largely applies to whether plaintiff has created a genuine issue of material fact regarding the prima facie element of causal connection. However, because consideration of these issues generally require a similar inquiry, we focus on the issue of pretext given that defendants have offered legitimate reasons for the discharge.

(C)(10), a court must consider the pleadings, affidavits, depositions, admissions and other documentary evidence submitted in the light most favorable to the nonmoving party. MCR 2.116(G)(5); *Bergen, supra* at 381.

Here, plaintiff presented evidence that Dixon, who was ultimately responsible for plaintiff's termination, was reactive and displeased by plaintiff's reports regarding the youth home's administration. Plaintiff submitted a series of memo and letters from Dixon to Heard, and to others, which included statements which plaintiff claims exhibited personal animosity and an intent to retaliate. Dixon's memos rebut plaintiff's claims, in part, by questioning plaintiff's own ethical and moral capacities, by criticizing plaintiff and past leaders of his union, and by recounting a record of disciplinary actions taken against plaintiff in his capacity as a JDS. Dixon also communicated that he took offense to plaintiff's allegations and asked: "If his allegations are correct, Mr. Jackson should be asked why he continues to work here." Of particular concern to plaintiff, in response to plaintiff's claims of discrimination toward homosexual youth, Dixon asked: "Did anyone bother to ask him how many homosexual youth have been admitted to the facility and how is it he finds himself an expert on this subject?" Finally, one memo concluded:

> Mr. Jackson's perception of life in the Wayne County Juvenile Detention Facility appears jaded and based on hyperbole, lies and propaganda. As of this writing, Mr. Jackson has been suspended for five (5) days for sleeping on the job. Again, I question his commitment to children and to this facility and his members. His ethics and character as the Union President are questionable at best.

Plaintiff also established that Heard characterized plaintiff's comments as "serious" and that a broad internal investigation ensued. Furthermore, defendants' potential concern may be inferred from the fact that the youth home had been subject to negative press in the past as a result of its failure to comply with various licensing requirements as well as from defendants' concern that a response to plaintiff's comments be provided to Conyers's office. Heard also testified that plaintiff was discharged, in part, because defendants understood that plaintiff's registry listing prevented him from meeting the "good moral character" requirement for employees of licensed child caring institutions. However, plaintiff provided evidence that defendants had been notified, apparently in relation to a different employee, that registry listing did not violate this requirement and that the Division of Child Welfare Licensing specifically "lacks the authority to prohibit the continued employment of an employee who is on the Central Registry." Thus, plaintiff established that his discharge had not been mandated by law and, moreover, he rendered suspicious one of Heard's proffered legitimate reasons for the discharge. Finally, the record appears to reveal that defendants' previous investigations into plaintiff's disciplinary issues did not reveal his registry listing, despite that he was placed on the registry as a result of a 1998 incident for which defendants suspended him for 60 days. Plaintiff's listing was not revealed until March 25, 2002, as the result of an unrelated investigation that began in January 2002, only five to six months after plaintiff's July 2001 comments and within three months of the October 2001 conclusion of the investigation of plaintiff's comments.

On the other hand, defendants presented strong evidence that plaintiff was discharged for legitimate reasons. First, even if a registry listing did not mandate discharge, listing arguably warranted discharge. This is evident from Heard's testimony that defendants also feared that plaintiff's continued employment could expose defendants to liability and that defendants presumed that registry listing was a "matter of significance" to the Family Independence Agency

("FIA"), which is the relevant regulatory agency. Their concern is confirmed by the same letter that established that the good moral character regulatory requirement did not mandate discharge; this letter goes on to note that an employee listed on the registry is a "liability" and that the FIA "expect[s] the facility to protect its residents by taking whatever steps it deems necessary" when it discovers that an employee is listed. Finally, defendants initially placed plaintiff on unpaid leave to afford him time to seek removal from the registry pursuant to MCL 722.627. It appears from the record that an administrative law judge denied plaintiff's request for removal. Plaintiff would have been reinstated to his JDS position had his name been removed. Accordingly, defendants have offered legitimate reasons for discharging plaintiff.

Plaintiff could have provided evidence that, despite the arguably legitimate reason for his discharge, he was treated differently from other employees who were listed on the registry. However, plaintiff has provided no such evidence. Rather, the only evidence in the record on this issue is defendants' proof that another JDS was placed on a similar leave pending termination if he did not successfully remove his name from the registry. Similarly, plaintiff appears to argue that his comments provoked a discriminatory investigation into his employment record, the purpose of which was essentially to conceal a fishing expedition for a legitimate reason to explain the adverse actions taken against plaintiff. Nonetheless, the record provides scant evidence of such discriminatory behavior on the part of defendants. Plaintiff does not show that their investigation of plaintiff's comments or of the later, unrelated incident was unusual. Plaintiff also does not provide evidence of comparable incidents which were subjected to less in-depth internal investigations.

Given this lack of evidence of discriminatory treatment, we determine, first, that plaintiff's evidence is insufficient for a reasonable jury to find that defendants' explanation for plaintiff's determination is unworthy of credence. *Taylor*, *supra* at 660. Rather, defendants' proffered reasons are supported by their warranted fears of liability, the apparent fact that they did not act sooner because they did not discover plaintiff's registry listing until March 2002, and their similar treatment of the other employee who was listed on the registry. Therefore, we must ask, second, whether the evidence can prove that plaintiff's discharge was more likely to have been motivated by retaliation than by legitimate reasons. *Id.*

We note that the WPA is a remedial statute which "must be liberally construed in favor of the persons it was intended to benefit." *Henry v Detroit*, 234 Mich App 405, 409; 594 NW2d 107 (1999). However, liberal construction of the WPA "does not transform mere speculation into a genuine issue of material fact." *West*, *supra* at 188 n 15. Here, when viewing the evidence in a light most favorable to plaintiff, there is arguably evidence that defendants were at least concerned about his comments and that Dixon had motive to retaliate. However, evidence of a potential retaliatory motive is not, in and of itself, proof that retaliation was more likely to have caused plaintiff's discharge.

Plaintiff argues that this evidence is sufficient to create the inference that his discharge was caused by retaliation. Circumstantial evidence giving rise to reasonable inferences may be sufficient to create a genuine issue of material fact. *Karbel v Comerica Bank*, 247 Mich App 90, 97-98; 635 NW2d 69 (2001). However, a jury may not be permitted to guess. *Skinner v Square D Co*, 445 Mich 153, 166; 516 NW2d 475 (1994). Evidence is mere speculation if it suggests two or more plausible explanations, each "just as possible as another." *Id.* at 164. Accordingly, a genuine issue of fact is created when there is evidence which points to one particular

conclusion and indicates a logical sequence of cause and effect; only then is summary disposition improper despite the existence of other plausible theories. *Id.*; *Karbel, supra* at 98.[4] Here, the evidence would not allow a reasonable jury to find that plaintiff's discharge was *caused* by retaliation, despite proof of the *existence* of potential reasons for a retaliatory motive. Rather, defendants' legitimate reasons are at least as likely to have caused plaintiff's discharge. Accordingly, plaintiff did not meet his burden to support his claim that defendants' legitimate reasons were mere pretext. Summary disposition was proper for this reason.

Affirmed.

/s/ Jane E. Markey
/s/ Bill Schuette
/s/ Stephen L. Borrello

[4] *Skinner, supra* at 164, thoroughly examined the concept of conjecture or speculation, albeit when offered to infer causation in negligence suits. *Karbel, supra* at 95, 98, extended the *Skinner* analysis to the evaluation of whether a party has created a genuine issue of fact precluding summary disposition under MCR 2.116(C)(10).